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No. 87-1607

In the Supreme Court of the United States

OCTOBER TERM, 1987

BARRY SILVERSTEIN AND DENNIS J. MCGILLICUDDY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any coercive government action against petitioners, the court of appeals erred in declining to review the denial of petitioners' motion to disqualify the United States Attorney from participating in a grand jury investigation of matters that may relate to petitioners' affairs.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 835 F.2d 1439 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on December 17, 1987. A petition for rehearing was denied on January 28, 1988 (Pet. App. 28a). The petition for a writ of certiorari was filed on March 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 1987, petitioners Silverstein and McGillicuddy received subpoenas to testify before and deliver records to a federal grand jury sitting in the Middle

District of Florida. Petitioners moved the district court to quash those subpoenas and to disqualify the United States Attorney from participating in any grand jury investigation involving petitioners. Petitioners based their motions on petitioner McGillicuddy's contacts with the same United States Attorney in the case of *United States* v. *Italiano*, No. 85-59-CR-T-(10) (M.D. Fla. 1987), rev'd, 837 F.2d 1480 (11th Cir. 1988), in which McGillicuddy participated as an immunized witness. Petitioners argued that the United States Attorney was not qualified to conduct the current investigation because (1) he termed McGillicuddy's testimony "inherently incredible" during the *Italiano* trial, and (2) he was familiar with McGillicuddy's prior immunized testimony and might make improper use of that testimony before the grand jury. Pet. App. 5a-9a.

The district court denied both motions. The court noted that petitioners' motions were "at best premature," and that petitioners' contentions could be renewed in a challenge to "an actual indictment" of petitioners if there should be one (Pet. App. 21a). The district court also declined to stay enforcement of the subpoenas. The court later entered orders granting immunity to petitioners under 18 U.S.C. 6002 and compelling them to testify (Pet. App. 15a-16a). Petitioners complied with the grand jury subpoenas, testified before the grand jury, and thereby rendered moot their motion to quash the subpoenas (*id.* at 2a).[1]

2. In a brief unpublished order, the court of appeals dismissed petitioners' appeal from the denial of their motion to disqualify the United States Attorney (Pet. App. 1a-2a). The court of appeals held that petitioners'

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[1] Petitioners no longer challenge the district court's denial of their motion to quash the subpoenas (see Pet. 4 n.5).

challenge did not present a justiciable Article III case or controversy. But the court of appeals made it clear that its decision was "without prejudice to [petitioners'] right to petition the district court for whatever relief the law may provide if the United States Attorney treats [petitioners] in such a fashion as to warrant the district court's intervention in the exercise of its supervisory power" (*id.* at 2a).

ARGUMENT

The court of appeals' judgment is correct, and that court's unpublished order does not conflict with the decision of any other court of appeals. Thus, no further review is warranted.

1. Article III of the Constitution limits the "judicial Power" of federal courts to "Cases and Controversies." That limitation is designed to ensure that the courts issue judgments only in specific, concrete controversies between interested parties. In the context of grand jury proceedings and investigations, the types of justiciable controversies are well settled. Once a grand jury has returned an indictment, an aggrieved individual may move to dismiss the indictment on a variety of grounds. See *Wayte* v. *United States*, 470 U.S. 598, 608 (1985). Prior to an indictment, a person may challenge a coercive governmental action such as the issuance of a subpoena. See *Cobbledick* v. *United States*, 309 U.S. 323 (1940). But in the absence of coercive action, an individual has no right to compel a federal court to exercise authority over an investigation being conducted by the Executive Branch.

This principle has been clear since *Laird* v. *Tatum*, 408 U.S. 1 (1972). In *Laird*, the question was "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without

more, of a governmental investigative and data-gathering activity" (*id.* at 10). This Court held that a federal court lacks such jurisdiction because the government's activities are not "regulatory, proscriptive, or compulsory in nature" (*id.* at 11). To permit review in the absence of any concrete harm or coercive government action would make the "federal courts as virtually continuing monitors of the wisdom and soundness of Executive action" (*id.* at 15).

The principle of *Laird* has great force in the context of a grand jury proceeding conducted by a United States Attorney. As the Court noted *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983) (footnote omitted), a grand jury depends "largely on the prosecutor's office to secure the evidence or witnesses it requires." Thus, the United States Attorney, like the grand jury, "must be free to pursue [his] investigations unhindered by external influence or supervision." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973).

Of course, a person who is subject to some coercive governmental action may challenge that action. Here, for example, petitioners presented an Article III controversy to the district court when they moved to quash the grand jury subpoenas. And they could have obtained appellate review of the district court's denial of their motion to quash if they had refused to comply with the subpoenas and had been held in contempt. See *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). The claims petitioners assert before this Court, however, present no case or controversy arising from the grand jury investigation being led by the United States Attorney.

If petitioners are served with new subpoenas, they may move to quash those subpoenas. Or if they are indicted, they may move to dismiss the indictment. But they may not obtain an order designating who may lead a grand jury investigation that may, in some unspecified way, relate to

their affairs. Any concern or resentment that results from being associated with a criminal investigation is simply " 'part of the social burden of living under government.' " *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938) (citation and footnote omitted). See also *United States* v. *Richardson*, 418 U.S. 166, 173 (1974) (citation omitted) (federal courts do not have Article III authority to address " 'generalized grievances about the conduct of government' "). Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980).

There is no authority in the courts of appeals supporting petitioners' argument that their motion to disqualify the United States Attorney presented a case or controversy. The only reported decision cited by petitioners that involves a motion to disqualify a prosecutor conducting a grand jury inquiry is *General Motors Corp.* v. *United States* (*In re April 1977 Grand Jury Subpoenas*), 584 F.2d 1366 (6th Cir. 1978) (en banc), cert. denied, 440 U.S. 934 (1979). In that case, the court of appeals held that it had no jurisdiction to review an order denying a motion to disqualify a government lawyer from conducting a grand jury investigation. In dismissing the appeal for want of jurisdiction, the court did not discuss whether General Motors' motion to disqualify presented an Article III controversy. Accordingly, there is no conflict between the Sixth Circuit's decision in *General Motors* and the decision in this case.

2. Even if a motion to disqualify a United States Attorney from leading a grand jury investigation were justiciable in some cases, petitioners' motion is not. Petitioners do not claim that the United States Attorney has acted improperly in the current investigation; rather, they seek his removal as a "prophylactic" measure to "avert future harm" (Pet. 6). But petitioners have not shown that the "harm" they seek to avoid is anything other than purely speculative. They currently are under no compulsion to

appear before the grand jury or to submit any evidence. And there is no reason to believe that petitioners are about to be indicted. On the contrary, petitioners testified under grants of immunity, and they have not been identified as targets of the grand jury's investigation. Thus, petitioners have clearly not made the threshold Article III "showing of any real or immediate threat that [they] will be wronged." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983). See generally *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974) (citations omitted) ("Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. * * * The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' ").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE 1988—202 037/60496